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AMERICAN BAR ASSOCIATION

CENTER FOR INNOVATION

STANDING COMMITTEE ON THE DELIVERY OF LEGAL SERVICES

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

STANDING COMMITTEE ON PROFESSIONAL REGULATION

STANDING COMMITTEE ON PUBLIC PROTECTION IN THE PROVISION OF LEGAL SERVICES

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

RESOLVED, That the American Bar Association encourages U.S. jurisdictions to consider innovative approaches to the access to justice crisis in order to help the more than 80% of people below the poverty line and the majority of middle-income Americans who lack meaningful access to legal services when facing critical civil legal issues, such as child custody, debt collection, eviction, and foreclosure.

FURTHER RESOLVED, That the American Bar Association encourages U.S. jurisdictions to consider regulatory innovations that have the potential to improve the accessibility, affordability, and quality of civil legal services, while also ensuring necessary and appropriate protections that best serve the public.

FURTHER RESOLVED, That the American Bar Association encourages U.S. jurisdictions to consider regulatory innovations that have been adopted or are under review in a growing number of state supreme courts and that are also under study by state and local bar associations, such as the authorization and regulation of new categories of legal services providers, the reexamination of Rule 5.4 of a jurisdiction's rules of professional conduct, and the reexamination of provisions related to the unauthorized practice of law.

FURTHER RESOLVED, That the American Bar Association encourages U.S. jurisdictions to collect and assess data regarding regulatory innovations both before and after the adoption of any innovations to ensure that changes are effective in increasing access to legal services and are in the public interest.

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REPORT

I. Introduction

Access to affordable civil legal services is increasingly out of reach across the United States. More than 80% of people below the poverty line and a majority of middle-income Americans receive inadequate assistance when facing critical civil legal issues, such as child custody, debt collection, eviction, and foreclosure.¹ Approximately 76% of civil matters in one major study of ten major urban areas had at least one self-represented party.² Moreover, in rural areas, there are often few, if any, lawyers to address the public's legal needs.³ As a result of these and related problems, the United States ranks 103rd out of 126 countries in terms of the accessibility and affordability of civil legal services.⁴

Traditional solutions to fixing this "access to justice" crisis are not enough. For decades, the legal profession and the organized bar have called for increased funding for civil legal aid, more pro bono work, and the recognition of civil *Gideon* rights that would afford people a right to a lawyer in matters involving essential civil legal needs (06A112A).⁵ These efforts are important and have met with some modest success, but they have not come close to fixing the problems that exist. In fact, the problems are becoming more severe.⁶

The legal profession cannot solve these problems alone. The public needs innovative models for delivering competent legal services, and such models require the knowledge and expertise of other kinds of professionals, such as technologists and experts in the design of efficient and user-friendly services.⁷ The existing regulatory structure for the legal profession, however, increasingly acts as a barrier to the involvement of other professionals, both within and outside of law firms. Regulators and bar associations in several states, including Arizona, California, New Mexico, Oregon, Utah, and Washington, have recognized this problem and are working to address it by

¹ LEGAL SERVS. CORP., JUSTICE GAP REPORT: MEASURING THE CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf>.

² NAT'L CTR. FOR STATE COURTS, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (2015), <https://www.ncsc.org/~media/Files/PDF/Research/CivilJusticeReport-2015.ashx>.

³ Jack Karp, *No Country For Old Lawyers: Rural U.S. Faces A Legal Desert*, LAW360 (Jan. 27, 2019), <https://www.law360.com/articles/1121543/no-country-for-old-lawyers-rural-u-s-faces-a-legal-desert>.

⁴ WORLD JUSTICE PROJECT, RULE OF LAW INDEX: CURRENT AND HISTORICAL DATA (2019), <https://worldjusticeproject.org/our-work/research-and-data/wjp-rule-of-law-index-2019/current-historical-data> (rankings are available in the downloadable spreadsheet).

⁵ AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 06A112A https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06_A112A.authcheckdam.pdf.

⁶ See, e.g., Anna E. Carpenter, et al., *Studying the "New" Civil Judges*, 2018 Wisc. L. Rev. 249, 284 (2018) (noting that "[w]here nearly every party was once represented by counsel, today, the vast majority of litigants are pro se").

⁷ See generally STANFORD LEGAL DESIGN LAB, <http://www.legaltechdesign.com/> (last visited Nov. 4, 2019).

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proposing or adopting substantial regulatory innovations.⁸ More U.S. jurisdictions are considering doing the same. In most cases, these jurisdictions are not considering deregulation, but rather re-regulation. That is, they are working to find ways to revise, rather than eliminate, regulatory structures so that any new services are appropriately regulated in the interests of the public.

The regulatory innovations that are emerging around the United States are designed to spur new models for competent and cost-effective legal services delivery that improve the quality of justice, but it is not yet clear which, if any, specific regulatory changes will best accomplish these goals consistent with consumer protection. More data is needed. For this reason, the Resolution does not recommend amendments to existing ABA model rules, such as the Model Rules of Professional Conduct. The ABA should nevertheless play a leadership role by adopting policies that encourage more state-based regulatory innovations, collecting and analyzing the data from those innovations, and using the resulting data to shape future reform efforts, including appropriate changes to or adoption of new ABA model rules and policies.

II. The Need for Regulatory Innovation

The Resolution calls for U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver competent and cost-effective legal services and have the potential to improve the accessibility, affordability, and quality of those services while retaining necessary and appropriate client and public protections.⁹ This Resolution is consistent with one of the recommendations of the ABA Commission on the Future of

8 See, e.g., ARIZ. TASK FORCE ON THE DELIVERY OF LEGAL SERVS., REPORT AND RECOMMENDATIONS (2019), <https://www.azcourts.gov/Portals/74/LSTF/Report/LSTFReportRecommendationsRED10042019.pdf?ver=2019-10-07-084849-750>; THE UTAH WORKGROUP ON REGULATORY REFORM, NARROWING THE ACCESS-TO-JUSTICE GAP BY REIMAGINING REGULATION (2019), <https://www.utahbar.org/wp-content/uploads/2019/08/FINAL-Task-Force-Report.pdf>; Press Release, N.M. Admin. Office of the Courts, Supreme Court Work Group to Consider Non-attorney Option for Providing Civil Legal Servs. (May 21, 2019), https://www.nmcourts.gov/uploads/FileLinks/a6efaf23676f4c45a95fdb3d71cae83/News_Release_Working_Group_to_Consider_Licensed_Legal_Technicians.pdf; Task Force on Access Through Innovation of Legal Services, CAL. BAR ASS'N, <http://www.calbar.ca.gov/About-Us/Who-We-Are/Committees-Commissions/Task-Force-on-Access-Through-Innovation-of-Legal-Services> (last visited Nov. 4, 2019); Special Committee on Technologies Affecting the Practice of Law, FLA. BAR, <https://www.floridabar.org/about/cmtes/cmte-me104/> (last visited Nov. 4, 2019).

9 See, e.g., AM. BAR ASS'N MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES (2016) (identifying public protections that should be considered when exploring regulatory changes, such as the independence of professional judgment, the protection of privileged and confidential information, and the accessibility of civil remedies for negligence and breach of other duties owed). Innovations must include necessary and appropriate protections for the public. Depending on the type of innovation and services provided, the traditional legal requirements of informed consent, client confidentiality, avoidance of certain conflicts and disclosure of other conflicts and fiduciary obligations may be appropriate but not necessary, while in other situations certain core requirements of professional ethics will be both necessary and appropriate.

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Legal Services (Commission), which recommended that “[c]ourts … consider regulatory innovations in the area of legal services delivery.”¹⁰

As noted above, the evidence is clear that existing solutions to the access to justice crisis are insufficient and that we need new ideas, such as regulatory reforms to unlock new delivery models. Although the need for change is compelling, the evidence does not yet support any particular regulatory innovation. For this reason, the resolution encourages U.S. jurisdictions to consider a few general categories of reform without endorsing any specific changes.

III. Categories of Regulatory Innovation

In general, states are currently considering three broad areas of regulatory reform as part of their efforts to improve the affordability, accessibility, and quality of civil legal services and civil justice.

A. Authorizing and Regulating New Categories of Legal Services Providers

Just as healthcare providers other than doctors can provide services to patients and reduce healthcare costs, legal service providers other than lawyers can do the same. Two major ABA reports recently reached a similar conclusion, recommending that U.S. jurisdictions consider authorizing and appropriately regulating new categories of legal services providers.

In 2014, the ABA Task Force on the Future of Legal Education concluded that a broader array of professionals should be permitted to deliver legal services:

Broader Delivery of Legal and Related Services: The delivery of legal and related services today is primarily by J.D.-trained lawyers. However, the services of these highly trained professionals may not be cost-effective for many actual or potential clients, and some communities and constituencies lack realistic access to essential legal services. To expand access to justice, state supreme courts, state bar associations, admitting authorities, and other regulators should devise and consider for adoption new or improved frameworks for licensing or otherwise authorizing providers of legal and related services. This should include authorizing bar admission for people whose preparation may be other than the traditional four-years of college plus three-years of classroom-based law school education, and licensing persons other than holders of a J.D. to deliver limited legal services. The current misdistribution of legal services and common lack of access to legal advice of any kind requires innovative and aggressive

10 AM. BAR ASS'N COMM'N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 6 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016FLSReport_FNL_WEB.pdf (Recommendation 2).

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remediation.¹¹

More recently, in its final report, the ABA Commission on the Future of Legal Services concluded that it “supports efforts by state supreme courts to examine, and if they deem appropriate and beneficial to providing greater access to competent legal services, adopt rules and procedures for judicially-authorized-and-regulated legal services providers (LSPs).”¹² The Commission offered several examples of these efforts:

Examples of such LSPs include federally authorized legal services providers [such as those who have long represented individuals before the Social Security Administration] and other authorized providers at the state level, such as courthouse navigators and housing and consumer court advocates in New York; courthouse facilitators in California and Washington State; limited practice officers in Washington State; limited license legal technicians in Washington State; courthouse advocates in New Hampshire; and document preparers in Arizona, California, and Nevada. In some jurisdictions, where courts have authorized these types of LSPs, these individuals are required to work under the supervision of a lawyer; in other instances, courts, in the exercise of their discretion, have authorized these LSPs to work independently. In each instance, the LSPs were created and authorized to facilitate greater access to legal services and the justice system, with steps implemented to protect the public through training, exams, certification, or similar mechanisms.¹³

There is not yet sufficient evidence to endorse any particular LSP model, so the Commission merely called for U.S. jurisdictions to consider authorizing new categories of legal services providers:

The Commission does not endorse the authorization of LSPs in any particular situation or any particular category of these LSPs. Jurisdictions examining the creation of a new LSP program might consider ways to harmonize their approaches with other jurisdictions that already have adopted similar types of LSPs to assure greater uniformity among jurisdictions as to how they approach LSPs. Jurisdictions also should look to others to learn from their experiences, particularly in light of the lack of robust data readily available in some states on the effectiveness of judicially-authorized-and-regulated LSPs in closing the access to legal services or justice gap. The Commission urges that the ABA Model Regulatory Objectives guide any judicial examination of this subject.

11 ABA TASK FORCE ON THE FUTURE OF LEGAL EDUCATION, REPORT AND RECOMMENDATIONS 3 (2014), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.pdf [hereinafter LEGAL EDUCATION REPORT].

12 AM. BAR ASS’N COMM’N ON THE FUTURE OF LEGAL SERVS., REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES 6 (2016), *supra* at 40-41.

13 *Id.* Since the Commission’s report was written, Utah has created Licensed Paralegal Practitioners starting in 2019 and New Mexico is considering the creation of Limited Licensed Legal Technicians that are similar to those in Washington state.

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The Resolution takes a similar approach and merely encourages U.S. jurisdictions to consider this kind of regulatory reform.

B. Experimenting with Variations to Rule 5.4

Rule 5.4 of the Model Rules of Professional Conduct generally prohibits lawyers from partnering and sharing fees with anyone who is not a lawyer. This prohibition impedes the development of innovative legal service delivery models,¹⁴ especially those that require the active involvement of other kinds of professionals, such as technologists, or that need substantial outside capital to succeed. Modifying Rule 5.4 in ways that do not sacrifice client and consumer protection and that permit other professionals to participate more fully in the development of impactful solutions is another tool that can be available for those who wish to use it.

The growing experience around the world with such arrangements – often called alternative business structures (ABS) – suggests that there is a great deal to gain by experimentation in this area.¹⁵ For this reason, several states recently adopted or are proposing significant liberalization of their versions of Model Rule 5.4.¹⁶

The ABA Commission on the Future of Legal Services called for this kind of review. In its final report, the Commission recommended “continued exploration” of reforms in this area so that “evidence and data regarding the risks and benefits associated with” ABS can be developed and assessed.

The benefits from such reforms are compellingly stated in a recent book by United States Supreme Court Justice Neil Gorsuch:

All else being equal, market participants with greater access to capital can increase output and lower price. So, for example, optometry, dental, and tax preparation services are no doubt cheaper and more ubiquitous today thanks to the infusion of capital from investors outside those professions. Indeed, consumers can often now find all these services (and more) in their local “superstores.” Yet Rule 5.4 of the ABA’s Model Rules of Professional Conduct — adopted by most states — prohibits nonlawyers from obtaining “any interest” in a law firm. So while consumers may obtain basic medical and accounting services cheaply and conveniently in and thanks to (say) Walmart, they can’t secure similar assistance with a will or a landlord-tenant problem. With a restricted capital base (limited to equity and debt of individual partners), the output of legal services is restricted and the price raised above competitive levels....

Notably, the United Kingdom has permitted multidisciplinary firms and nonlawyer

¹⁴ WILLIAM HENDERSON, STATE BAR OF CAL., *LEGAL SERVICES LANDSCAPE REPORT* (2018), <http://board.calbar.ca.gov/docs/agendalitem/Public/agendaitem1000022382.pdf>.

¹⁵ *Id.*

¹⁶ See ABA CTR. FOR INNOVATION, *LEGAL INNOVATION REGULATORY SURVEY*, <http://legalinnovationregulatorsurvey.info/> (last visited Nov. 4, 2019).

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investment since 2007. In the first two years of the program, 386 so-called “alternative business structures” (ABSs) were established. Six years into the experiment, the Solicitors Regulatory Authority analyzed ABSs and found that while these entities accounted for only 3 percent of all law firms, they had captured 20 percent of consumer and mental health work and nearly 33 percent of the personal injury market — suggesting that ABSs were indeed serving the needs of the poor and middle class, not just or even primarily the wealthy. Notably, too, almost one-third of ABSs were new participants in the legal services market, thus increasing supply and presumably decreasing price. ABSs also reached customers online at far greater rates than traditional firms — over 90 percent of ABSs were found to possess an online presence versus roughly 50 percent of traditional firms, again suggesting an increased focus on reaching individual consumers. Given the success of this program, it’s no surprise that some U.S. jurisdictions have appointed committees to study reforms along just these lines.¹⁷

On several occasions, the ABA has considered and rejected amendments to Model Rule 5.4 that would have permitted some form of ABS. The primary argument against such changes was that they would have jeopardized a lawyer’s professional independence. These concerns, however, fail to recognize that lawyers already exercise professional independence in conceptually similar situations.¹⁸

Another reason to be skeptical of the concern about professional independence is that there is no evidence of public harm in the increasing number of the countries that now permit lawyers to practice in some form of ABS.¹⁹ The ABA Commission on the Future of Legal Services made a similar observation in its final report:

The Commission’s views [calling for continued exploration of reforms in this area]

17 NEIL M. GORSUCH, A REPUBLIC IF YOU CAN KEEP IT 258-60 (2019).

18 Justice Gorsuch explains:

For example, we permit third parties (e.g., insurance companies) to pay for an insured’s legal services but restrict their ability to interfere with the attorney-client relationship. We allow in-house counsel to work for corporations where they must answer to executives but require them sometimes to make noisy withdrawals. And we increasingly permit law firms to manage client and personal financial conflicts by screening affected lawyers rather than by banning the firm from representing a client. Of course, in each of these cases lawyers stand to benefit from rules that permit an engagement that might otherwise be forbidden while here, by contrast, they may stand to lose financially. But surely it shouldn’t be the case that we will forgo or lift outright bans in favor of more carefully tailored rules only when it’s in our financial interest.

Id. at 260.

19 ABA COMM’N ON THE FUTURE OF LEGAL SERVS., ISSUES PAPER REGARDING ALTERNATIVE BUSINESS STRUCTURES 11 (2016),

https://www.americanbar.org/content/dam/aba/images/office_president/alternative_business_issues_paper.pdf; LEGAL SERVS. Bd., TECHNOLOGY AND INNOVATION IN LEGAL SERVICES 2018,

<https://www.legalservicesboard.org.uk/research/technology-and-innovation-in-legal-services-2018> (last visited Nov. 4, 2019).

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were informed by the emerging empirical studies of ABS. Those studies reveal no evidence that the introduction of ABS has resulted in a deterioration of lawyers' ethics or professional independence or caused harm to clients and consumers. In its 2014 Consumer Impact Report, the UK Legal Consumer Panel concluded that "the dire predictions about a collapse in ethics and reduction in access to justice as a result of ABS have not materialised." Australia also has not experienced an increase in complaints against lawyers based upon their involvement in an ABS.²⁰

Despite the limited risks associated with liberalizing Rule 5.4 to allow lawyers to practice in settings outside the traditional law firm or to seek equity funding from the capital markets and the potential innovations that might accompany it, it is also clear that there is not yet enough data to know what the "model" approach to this subject should be or what effect ABS will have on addressing the access to justice crisis. For this reason, the resolution does not propose a specific change to Model Rule 5.4 and instead merely encourages jurisdictions to try new approaches so that we can learn from them and assess their impact.

C. New Approaches to the Unauthorized Practice of Law

The resolution also encourages U.S. jurisdictions to develop more permissive approaches to the unauthorized practice of law (UPL). U.S. jurisdictions often define UPL broadly or in such an ambiguous way that prospective innovators do not want to risk developing new services and face allegations that they are engaging in UPL. Appropriate and careful liberalization of UPL provisions can change this dynamic and encourage more innovation.

With appropriate re-regulation, the risks from more permissive UPL rules are small. For example, in the United Kingdom, rather than trying to define the practice of law, the Legal Services Act of 2007 provides that anyone can perform law-related activities unless those activities are specifically "reserved" for authorized professionals.

That is, the burden is on the profession to identify the specific areas of legal services that only authorized professionals should be permitted to perform. There is no evidence of harm in the U.K. from such an approach relative to the much more restrictive approach in the U.S., where the definition of UPL tends to be so vague that it covers a range of services that could be safely performed by professionals other than lawyers.²¹

Recognizing the problems with existing approaches to UPL and the low risks from careful step-by-step liberalization of existing policies, several U.S. jurisdictions have begun to experiment in this area. For example, Utah has developed a so-called

20 See *LEGAL EDUCATION REPORT*, *supra* note 11, at 42.

21 Deborah L. Rhode, *What We Know and Need to Know About the Delivery of Legal Services by Nonlawyers*, 67 S. C. L. REV. 429, 431-33 (2016).

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“regulatory sandbox” that will allow new kinds of legal services providers to operate on a pilot basis without concerns that they will be accused of UPL.²² Other jurisdictions are seeking to expressly recognize that online legal document providers are not engaged in the unauthorized practice of law in exchange for modest regulation or registration requirements.²³

These developments are still in their infancy in the U.S., so as with other regulatory reforms, it is not possible to identify a model approach. (Indeed, such efforts in the UPL particular context may raise antitrust concerns.)²⁴ The point of the resolution is to encourage U.S. jurisdictions to consider regulatory innovations that foster new ways to deliver effective legal services and have the potential to improve the accessibility, affordability, and quality of those services while preserving core protections.²⁵

IV. Data Should be Collected and Analyzed

The final part of the resolution calls for the collection and assessment of data regarding regulatory innovations, both before and after the adoption of any innovations, to ensure that changes are data driven and in the interests of the public. The collection of such data is critical if the legal profession is going to make reasoned and informed judgments about how to regulate the delivery of legal services in the future and how to address the public’s growing unmet legal needs. We need to experiment with different approaches, analyze which methods are most effective, and determine which kinds of regulatory innovations best provide the widest access to legal services, provide continuing and necessary protections for those in need of legal services, and best serve the public interest.

V. Conclusion

Justice Louis Brandeis once wrote that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²⁶ The resolution calls for precisely this kind of courageous experimentation. In

22 Press Release, *Utah Courts, Utah Supreme Court Adopts Groundbreaking Changes to Legal Service Regulation* (August 29, 2019), <https://www.utcourts.gov/utc/news/2019/08/29/utah-supreme-court-adopts-groundbreaking-changes-to-legal-service-regulation/>.

23 Jim Ash, *Board Recommends Voluntary Registration Program for Online Legal Service Providers*, FLA. BAR NEWS (Sept. 25, 2019), <https://www.floridabar.org/the-florida-bar-news/board-recommends-voluntary-registration-program-for-online-legal-service-providers/>.

24 ABA CTR. FOR PROF’L RESPONSIBILITY, *FTC Letter Opinions on the Unlicensed Practice of Law* (June 23, 2016), https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/ftc/.

25 See *supra* note 9.

26 *New States Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).

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light of the severe access to justice crisis in the United States, the continued reliance on existing regulatory approaches is not a viable or responsible option.

Respectfully submitted,

Daniel B. Rodriguez
Chair, Center for Innovation
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